Mem. Alex. Young

 January 29. 1766.

Johnston &
Anstruther-Easter
12. Febr.y 1766.
Sustain the Objection

MEMORIAL

FOR

Alexander Young, *George Darsie*, *Thomas Smith*, and *Robert Bridges*, Counsellors of the Borough of *Anstruther-Easter*, and for *Thomas Scot*, and others, Complainers;

AGAINST

Andrew Johnston of *Renniehill*, *Charles Robb* Tailor in *Anstruther-Easter*, and others, pretended Magistrates and Counsellors of the said Borough, Respondents.

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THE complainers did, in due time, exhibit their complaint to your Lordships, founded on the statutes of the 2d and 16th of his late Majesty King George II. *for the more effectual preventing bribery and corruption in the election of members to serve in parliament*; setting forth, That at the late Michaelmas election of magistrates and counsellors of the said borough of Anstruther-Easter, the majority of the persons elected had been chosen through the means of bribery and corruption; and more particularly, in consequence, and under the influence of a most corrupt bargain, made with Sir John Anstruther, or his agents, whereby Sir John engaged to pay the public debts of the borough, amounting to about £ 800 Sterling, providing the council should, at the said Michaelmas elec-

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tion, be ſo modelled, as to ſupport the intereſt of Sir John, in the ſubſequent choice of their delegate for the election of a member of parliament.

As by a clauſe in the aforeſaid ſtatute of the 16th of the late King, regulating the form of procedure upon ſuch ſummary complaints, your Lordſhips are, in general, directed to grant a warrant for ſummoning the magiſtrates and counſellors elected by the majority, ſo the complaint, in this caſe, prayed your Lordſhips to grant warrant for ſerving the ſame upon the perſons, who, the complainers were informed and believed, were the whole magiſtrates and counſellors elected at Michaelmas laſt, (excepting the complainers themſelves); and " to ordain the ſaid perſons to give in their " anſwers; and, upon adviſing the caſe, to reduce and " make void the pretended election of magiſtrates and " counſellors of the ſaid borough, made on the 14th day " of September laſt."

Your Lordſhips having accordingly granted warrant for ſervice, in common form, the complaint was regularly ſerved upon all and each of the preſent magiſtrates and counſellors, other than the complainers. Anſwers were thereupon given in, containing, *inter alia*, a preliminary objection, importing, That among the perſons complained upon, mention was made of one *Thomas Brown wright*, as a preſent *counſellor* of the borough, whereas there is no counſellor of that name, but there is one named *George Brown*, upon whom the meſſenger had, without authority, ſerved the complaint, and conſequently the ſaid George Brown, not being a complainer, nor properly called as a defender, the whole council were not made parties, and the complaint fell to be diſmiſſed. Replies were given in to theſe anſwers, and, upon adviſing the cauſe, your Lordſhips were pleaſed to appoint parties to give in memorials upon that objection. This, accordingly, is humbly offered upon the part of the complainers.

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As the complainers were deſirous of throwing all the light upon this queſtion that they could poſſibly do; ſo, ſince the above appointment of memorials, they have employed a proper perſon to ſearch the records of the proceedings in election-cauſes, and others, ſince the act of the 16th of the late King, in order to diſcover precedents or deciſions upon ſimilar queſtions: But though great pains has been beſtowed in this ſearch, they have not yet diſcovered any thing to the purpoſe; and they are told, that it would take many weeks more to finiſh the ſearch. The complainers, therefore, can only propoſe at preſent, to make ſome addition to what has been formerly argued for them, and mention ſuch authorities as they have met with.

The nature of the objection has been already explained; and the ſhort ſtate of the fact, which gave riſe to it, is this: The complainers having heard, that, among the counſellors elected, there was one named *Thomas Brown*, a *wright*, they, in their complaint, craved a warrant for ſervice upon him, as well as the other counſellors; but before the complaint was actually ſerved, the complainers got certain information, that *Brown* the *wright* and *counſellor's* Chriſtian name was not *Thomas*, but *George:* They therefore directed the meſſenger to make the ſervice upon *George Brown*, the perſon truly intended; and both the copy of citation delivered to him *perſonally*, and the execution of the meſſenger bear, that he had been erroneouſly named *Thomas* in the complaint.

Such is the fact; and in anſwer to the objection itſelf thereupon founded, the complainers muſt, in the *firſt* place, ſubmit to your Lordſhips, That the complaint was exhibited under ſuch circumſtances as ſufficiently excuſe the complainers, and bar the reſpondents from availing themſelves of ſuch a trivial miſtake as this ſeems to be. As the election in queſtion had been brought about by the moſt unjuſtifiable

unjuſtifiable means, ſo, after it was over, the conduct of the reſpondents, and their adherents, was, in many reſpects, equally improper. Among other devices for maintaining the advantage they had gained, they ſeemed to have thought it material, to keep the complainers as much, and as long in the dark, with regard to their proceedings at the election, as poſſible. With this, or ſome other view, the council-book, containing the minutes of election, which uſed to lie in the cuſtody of the town-clerk, the writer and proper cuſtodier of that record, was taken from him, and put into the hands of the treaſurer. By this, or other means, the complainers could not get acceſs to that book, or an extract from it, till long after the complaint was preſented; although they frequently demanded the ſame from the town-clerk. It appears, from the complaint itſelf, page 6. that, at the time of its being drawn, the complainers had not got an extract of the minutes, and therefore, could not give a full ſtate of the proceedings. In fact, they did not get the extract ſooner than the beginning of this month of January; after requiring, under form of inſtrument, the reſpondents, when conveened as magiſtrates and counſellors, to furniſh the ſame. This requiſition cannot be denied, although, in reſpect of its having been complied with, it was thought unneceſſary for Alexander Clapperton, the notary, to extend the proteſt.

The caſe ſo ſtanding, it can be no matter of ſurprize, far leſs of blame, upon the complainers, that they ſhould have fallen into this innocent miſtake as to the Chriſtian name of Mr *Brown*. They were rightly informed that one *Brown*, a wright, had been elected a counſellor, but by ſome error, probably in the writer of the liſt, he was called *Thomas*, in place of *George*. Had the minutes of council been got, and tranſmitted to the complainers agent at Edinburgh, this miſtake would have been obſerved, and corrected in time. But the minutes could not be tranſmitted,

mitted, nor had the complainers occaſion to ſee the complaint till it was given in, and tranſmitted to be ſerved, when the miſtake was diſcovered, and every thing done, in the complainers power, to correct it, by the ſervice and execution already mentioned.

The complainers, with great deference, apprehend, That, under theſe circumſtances, the reſpondents cannot be intitled to avail themſelves of this objection, to the effect of getting the complaint diſmiſſed. The complainers muſt leave it with your Lordſhips to conſider, in due time, what might be the conſequence of ſuch diſmiſſion. Should the objection be regarded only as a dilator, there can be no inducement for giving way to it, ſince the reſpondents cannot thereby reap any ſubſtantial benefit, but only occaſion unneceſſary trouble and expence to the complainers. On the other hand, if it ſhould be conſidered as reſolving into a peremptory defence, ſo as to foreclose the complainers from any other means of redreſs, the ſtrongeſt motives of equity and juſtice would concur for repelling it, as it would be an extreme hardſhip, were the complainers to be deprived of their juſt right, and an election to be eſtabliſhed, which, in *hoc ſtatu*, muſt be held to have been brought about by the moſt corrupt and illegal means, merely in reſpect of this miſtake of part of a counſellor's name, to which the reſpondents themſelves have contributed, and when the man has, nevertheleſs, been truly cited as a party.

2*do*, As to the merits of the objection itſelf, the complainers apprehend, that it is not relevant, becauſe, from the deſcription given in the complaint, *ſatis conſtat de perſona*. There is not the leaſt room to doubt, that the perſon intended to be complained upon, is this George Brown *wright*, and *counſellor* of the borough. There is not another perſon of the name of *Brown*, a member of this council: There is not even another counſellor who follows the buſineſs of a *wright*. It is impoſſible, therefore, that any doubt can remain who was the perſon complained upon, when he was pointed

out by ſo many diſtinguiſhing circumſtances, as his ſirname *Brown*, his buſineſs of a *wright*, and his office as a *counſellor*. Had his Chriſtian name been left blank, it muſt be acknowledged, that there could not have been the leaſt ſhadow of an objection. Why then ſhould an objection ariſe from his Chriſtian name being erroneouſly filled up, while, at the ſame time, no uncertainty whatever flows from that error, but, on the contrary, the perſon meant is pointed out with as much certainty as if his Chriſtian name had been properly inſerted?

The only uſe of proper names is to diſtinguiſh perſons. Hence, where a perſon is ſufficiently aſcertained by a deſignation, to name him becomes unneceſſary. Had both name and ſirname been here omitted, the perſon meant was ſufficiently pointed out, and there could have been no doubt on whom the complaint was to be ſerved. Nay, had both been erroneouſly filled up, ſtill that error could never have miſled the meſſenger, in ſerving the complaint, when it cannot be even alledged that there is another *counſellor*, who is by employment a *wright*, beſides this George Brown. The concern, too, which *Brown* has in this cauſe is merely *ex officio* as a *counſellor*, and not as a private perſon; conſequently his being properly diſtinguiſhed by his public character, joined with his ſirname and occupation, is all that in reaſon is neceſſary. When ſuch is the caſe, it muſt appear ſomewhat extraordinary, ſhould the inſertion of the word *Thomas*, in mentioning the man's name, inſtead of *George*, have the effect of ſcreening all the corrupt practices of the reſpondents, in ſo far as to caſt this complaint; and ſtill more ſo, ſhould it eventually render valid an election of magiſtrates and counſellors, otherwiſe void and null.

The effect of a *miſnomer* in judicial proceedings, has not been particularly treated of by our lawyers, probably owing to its having been little regarded, eſpecially in matters of civil right, *ſi conſtet de perſona*. This ſeems to be the ſole object of our laws and ſtatutes, that the party ſhall be

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ſufficiently deſigned or deſcribed, ſo as to diſtinguiſh him from others.

The ſubject has been more nicely conſidered in the law of England. We there find theſe rules laid down as to *miſnomers*: " *Nomen eſt quaſi rei notamen*, and was invented " to make a diſtinction between perſon and perſon; and " where a perſon is deſcribed, ſo as that he may be certain- " ly diſtinguiſhed and known from other perſons, the o- " miſſion, or, in ſome caſes, the miſtake of the name " ſhall not avoid the grant." II. " *Rep.* 20, 21. And if " the name of a party is miſtaken, the judges ought to " mould a ſmall miſtake therein, to make good a contract, " *&c.* and ſo as to ſupport the act of the party by the law;" *Hob.* 125. Hence lands given to *Robert* Earl of Pembroke, whoſe name was *Henry*, and to *George* biſhop of Norwich, whoſe name was *John*, were held good grants; *Coke*, 1*ſt Inſt. f.* 3.

Jacob's Law-Dict. *voce Miſnomer.*

In caſes of a criminal nature, more preciſion may be juſtly required, in order to give the party accuſed every advantage; yet we find that, in the caſe of felony, where a party is indicted and brought to the bar, a *miſnomer* of the Chriſtian name will not caſt *the indictment* (though it will an appeal), if it appear that the party is ſufficiently known by the deſcription given of him. Thus Lord Chief Juſtice *Hale* obſerves, " That if the defendant, in an appeal or " indictment, plead *miſnomer* of his ſirname, the plantiff " or King may aver, *Que connus per un noſme & l'autre*, " 1 H. 7. 29. a.—But in an *appeal* or action at the ſuit " of the party, if *miſnomer* be pleaded of the Chriſtian name, " the plaintiff muſt take iſſue, and cannot plead *connus per* " *l'un noſme & l'autre*, 1 H. 7. 29. a. *&c.* In an *in-* " *dictment* of *felony*, if the priſoner plead *miſnomer* of his " Chriſtian name, ſome books hold it a good plea, 11 H. " 4. 41. b. *miſnomer* 18th, *&c*; but other books of greater " and later authority be to the contrary, *&c.* 1 H. 5. 5. b. " *miſnomer* 9. coron. 274, *&c.*—It ſeems by the caſe of " Gerard, before cited, which was a record of a plea in the

Pleas of the Crown, part 2. cap. 30. p. 238.

" the time of Edw. IV. though the defendant may plead " *miſnomer* of his Chriſtian name, yet the King may aver " *connus per l'un noſme & l'autre*, though it be otherwiſe in " an appeal."

As to the caſe of General Gordon of Auchintoul, which has been mentioned as a precedent for the reſpondents, the objection was made, to avoid a forfeiture for high-treaſon, where every exception muſt be favourably received. The deſcription given of the General in the act of attainder, was, " Major-General *Thomas Gordon*, Laird of Auchin- " toul;" whereas his Chriſtian name was *Alexander*. When the cauſe came before the Houſe of Lords, upon appeal, the queſtion was put to the judges, " Whether if Major- " General *Alexander Gordon*, Laird of Auchintoul, had " been brought to the King's-bench bar, and execution " prayed againſt him, the Court would have awarded ex- " ecution?" The judges anſwered in the negative; " be- " cauſe, in awarding execution, they muſt purſue the act " of parliament on which the judgment is founded;" and thereupon the decree of this Court, finding the General not attainted, was affirmed. This appears from the learn- ed Judge *Foſter*'s reports, page 81. and, in the complain- ers humble apprehenſion, cannot apply to the preſent caſe, which evidently does not require the ſame preciſion as to names, as either indictments for crimes, or acts of at- tainder for high-treaſon, the purpoſe of mentioning the counſellors in this complaint, as well as the tendency of the action, being quite of a different nature.

A different deciſion, alſo very lately, occurred, even in a matter of treaſon, which your Lordſhips will remember. It is the caſe of *Lord Pitſligo*, who was mentioned in the act of attainder, by the deſcription of " Alexander Lord " Pitſligo." He claimed the eſtate as not forfeited, in re- ſpect, that, by the patent of his family, the peerage was conferred by the title of " Lord Forbes of Pitſligo." Your Lordſhips *ſuſtained* the claim; but, upon an appeal, the de-

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cree was *reverſed*. It appears from the report of the caſe, that although the counſel for the crown admitted, that a title of dignity is *parcel of the name*, yet they maintained, that there was no neceſſity for the legiſlature's being confined to any preciſe forms of expreſſion in an act of attainder, if their meaning appeared with ſufficient certainty.

The complainers, however, will ſay no more on ſuch caſes, as, at any rate, they humbly think they can form no rule for the preſent, where nothing more is the ſubject of inquiry, than, Whether this George Brown, is, or is not to be held as a party in Court, where he has certainly been cited to compear, and is appearing by his counſel, and where no penalty is ſought to be recovered from him, far leſs a forfeiture of his life or eſtate.

This leads the complainers to the *third* and *laſt* branch of their argument; namely, That, notwithſtanding the error as to Brown's Chriſtian name, which caſually ſlipt into the complaint, yet, in fact, he has properly been made a party to this proceſs, by ſervice of the complaint upon him. The complainers have already ſhown, and indeed there can be no room to doubt, that this George Brown was the perſon intended to be complained of, and to be ſerved and ſiſted as a party accordingly; ſeeing it is undeniable, that there is no other perſon than he who is of the ſirname of *Brown*, of the buſineſs of a *wright*, and a *counſellor* of Anſtruther-Eaſter; accordingly the meſſenger did duly ſerve the ſaid George Brown with this complaint, and his Chriſtian name, as well as all the other parts of his deſignation, is properly entered both in the copy of citation given to him, and in the execution returned by the meſſenger. Neither, with ſubmiſſion, is the objection well-founded, that this ſervice and execution was done without a proper warrant.

The complainers apprehend, that there is no neceſſity for all the formality that is commonly uſed in complaints

like the preſent, by praying for a warrant, ſpecially to cite ſuch and ſuch perſons as magiſtrates and counſellors. The ſtatute of the 16th of the late King, on which all complaints of this nature muſt neceſſarily be founded, requires no ſuch preciſion. It only requires, that the Court ſhall grant a warrant for ſummoning "The magiſtrates and "counſellors elected by the majority, on thirty days no-"tice." A warrant prayed for, and granted in terms of the ſtatute, is certainly all that is neceſſary on ſuch a complaint; and indeed it may often happen, that the party injured cannot diſcover the real names and deſignations of every perſon elected by the majority, before the complaint muſt be put in; conſequently a general warrant for citing the magiſtrates and counſellors elected by the majority, would be available for anſwering all the purpoſes of the ſtatute. Now ſuch a warrant has here been in effect craved and granted, the prayer of the complaint being for authority to ſerve on the pretended magiſtrates and counſellors for the preſent year: And although the complainers did alſo mention the names of theſe magiſtrates and counſellors, and thereby fell into this miſtake as to *Brown*, yet the principle of law, *Utile per inutile non vitiatur*, here applies. The warrant was therefore ſufficient authority for citing all the pretended counſellors, elected by the majority, (who were not complainers), under their proper names and deſignations; and the meſſenger accordingly did rightly cite this George Brown, to the effect of making him a party to this cauſe.

The complainers ſhall conclude, with ſubmitting it to your Lordſhips conſideration, Whether, ſuppoſing the objection were admitted and ſuſtained, ſo as to have *Brown* held as yet not properly cited, the conſequence thereof ſhould be the diſmiſſing this complaint. The ſtatute of the 16th of the late King, does not require as eſſential, that the names of the counſellors, elected by the majority,

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ſhould be mentioned in the complaint. It is ſufficient, that the complaint ſet forth the wrong done at the election, and crave to have the ſame rectified. The complaint muſt be preſented to your Lordſhips, within two calendar months after the election; but the ſtatute does not require, nor has it in practice been held neceſſary, that it ſhould be alſo ſerved within that time. The complaint, therefore, is but a general libel, as to the wrong done at the election; and as your Lordſhips, in other caſes, do allow libels to be amended, ſo it is apprehended, that your Lordſhips might ſtill allow the complainers to correct the error in the complaint, as to *Brown*'s name, and to ſerve it of new upon him, ſeeing it was preſented to your Lordſhips in due time, and would have been relevant, tho' *Brown*'s name had not been at all mentioned in it.

In reſpect whereof, &c.

DAV. RAE.